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No. 89-1747

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

CARLISSA CHURCHILL, Informal Administrator
Of The Estate Of Patrick Churchill,
Deceased; And DALE CARLOUGH,

Petitioners,

vs.

The F/V FJORD, Her Engines, Tackle,
Apparel, Appliances, Equipment, Apparatus
And Furniture; WILLIAM McLINN, Owner and
Operator Of Said F/V FJORD, and RUSSELL McLINN,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE N. HAYES
DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
1007 West Third Avenue, Suite 400
Anchorage, Alaska 99501
(907) 279-3581
Counsel for Respondents

QUESTIONS PRESENTED

I. Petitioners have phrased the first question as follows:

MAY A VESSEL, POSSESSION OF WHICH WAS ENTRUSTED TO A CREWMAN AND BECAME INVOLVED IN A COLLISION, ESCAPE LIABILITY IN REM MERELY BECAUSE THE CREWMAN EXCEEDED HIS AUTHORITY IN HIS USE OF THE VESSEL?

Respondents submit that the question is more accurately phrased as follows:

IS IT APPROPRIATE TO DENY *IN REM* LIABILITY OF A MOORED SEINER FOR THE NEGLIGENCE, UNPERMITTED, INTOXICATED, ILLEGAL, PRIVATE, RECREATIONAL, NOCTURNAL OPERATION OF HER SKIFF FOR REASONS UNRELATED TO THE COMMERCIAL PURPOSE OF THE SEINER?

An alternative question should also be considered if the writ is granted:

DID RUSSELL MCLINN'S INTOXICATED, ILLEGAL, UNPERMITTED, PRIVATE, RECREATIONAL, NOCTURNAL USE OF THE SKIFF FOR PURPOSES UNRELATED TO THE FUNCTION OF THE F/V FJORD SEVER THE SKIFF FROM THE EQUIPAGE OF THE F/V FJORD, FOR PURPOSES OF CONSIDERING WHETHER THE F/V FJORD CAN BE HELD LIABLE IN REM?

II. Petitioners phrase their second question as follows:

DID THE COURT OF APPEALS ERR IN REFUSING TO REMAND THIS CASE TO THE DISTRICT COURT TO AFFORD PETITIONERS THE STATUTORY PRESUMPTION GRANTED THEM BY ALASKA LAW, AS 05.25.040, THAT ARISES FROM ENTRUSTING ONE'S WATERCRAFT TO

QUESTIONS PRESENTED - continued

AN IMMEDIATE FAMILY MEMBER WHEN THE COURT OF APPEALS DETERMINED IT WOULD NOT REACH THE LEGAL QUESTION OF THE INVALIDITY OF THE STATUTE?

Respondents submit that the question may be phrased as follows:

WAS THERE AMPLE RECORD EVIDENCE TO SUPPORT THE CONCLUSION OF THE COURT OF APPEALS THAT THE STATUTORY PRESUMPTION CREATED BY ALASKA STATUTE 05.25.040 WAS REBUTTED AND TO OVERCOME ANY POSSIBLE INFERENCE THE OWNER CONSENTED TO RUSSELL McLINN'S USE OF THE SKIFF?

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Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners have attached all the pertinent opinions to their petition for writ of certiorari. For the convenience of the Court, respondents reproduce only the two most important opinions. Appendix A to this brief contains the

district court's April 24, 1986 Findings of Fact and Conclusions of Law. Appendix B contains the amended opinion of the Ninth Circuit (*Churchill v. F/V FJORD*, 892 F.2d 763 (9th Cir. 1989)).

STATEMENT OF THE CASE

This petition concerns petitioners' attempt to hold the F/V FJORD liable *in rem* and William McLinn personally liable for Russell McLinn's negligence during his unpermitted, illegal, intoxicated, private, recreational operation of the F/V FJORD's seine skiff. In general, respondents consider the factual discussion found in the amended opinion of the court of appeals to state the facts more accurately in context than the petition. *Churchill v. F/V FJORD*, 892 F.2d 763 (9th Cir. 1989) (attached hereto as Appendix B).

Respondents disagree with several statements in petitioners' statement of the case, including the following statements pertinent to the petition:

(1) Petitioners flatly assert the skiff was "equipment" of the F/V FJORD. Petition at 3, 5. Whether the skiff was equipment of the F/V FJORD at the moment of the accident was in dispute in the court of appeals, which did not reach that issue. 892 F.2d at 867 n.2; Appendix B at 6 n.2. Most of the facts pertaining to the equipment issue are contained in Appendix B, and those facts and additional record evidence are discussed by respondents in Argument I below.

(2) When petitioners flatly assert that it was undisputed the owner left Russell McLinn "in charge" of the seine vessel and all its equipment, petition at 6, they ignore a subtle, but important, distinction drawn by the FJORD's owner on cross-examination. The owner, William McLinn, was asked whether Russell was "in charge of the skiff", but in answering he drew the following distinction: "He [Russell] was in charge of *taking care* of the boat." Appendix C, containing RT 559, emphasis added.

(3) Petitioners state that the trial court found "there had been no 'negligent' entrustment under the doctrine of negligence entrustment But it simply never addressed whether there had been an entrustment or whether Russell McLinn had consent." Petition at 8 n.7, citing Appendix A at 4, Finding 16. Actually, the trial court there found that "no creditable evidence adequately supports plaintiffs' allegations that William McLinn, as owner and operator of the F/V FJORD negligently entrusted the skiff . . . to his son Russell McLinn." Appendix A at 4, Finding 16. The trial court did not specify whether plaintiffs failed to prove negligence, or entrustment, or both. The cited finding consequently does not support the distinction petitioners would draw. Respondents submit that there was ample evidence (discussed in Argument I) supporting, if not requiring, a determination that William McLinn did not "entrust" the skiff to Russell McLinn beyond the necessities of watching over the moored skiff and seiner while the rest of the crew was out of town, and that William McLinn did not "entrust" the skiff to Russell McLinn for navigational purposes and certainly not for purposes of using it recreationally.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FACTS OF THIS CASE SUPPORT THE CONCLUSION THAT, FOR PURPOSES OF CONSIDERING PETITIONERS' *IN REM* LIABILITY CLAIM, RUSSELL McLINN DID NOT HAVE "LAWFUL POSSESSION" OF EITHER THE SKIFF OR THE SEINER AT THE TIME OF THE ACCIDENT, AND THE SKIFF WAS NOT THEN THE EQUIPAGE OF THE SEINER.

A. There Is No Reason For This Court To Review The Court Of Appeals' Resolution Of The Fact-Specific "Lawful Possession" Dispute.

This Court's dictum in *The Barnstable*, 181 U.S. 464, 467 (1901) provided the starting point for petitioners' efforts to hold the seiner *FJORD* liable *in rem* for Russell McLinn's negligent operation of the *FJORD*'s skiff: "[T]he law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer."

The issue of lawful possession necessarily turns on the facts of each case. The facts of this case establish that Russell McLinn did not have lawful possession of the skiff (or the seiner) at the time of the accident. (Although he was in physical possession of the skiff, he was not in physical possession of the seiner at the time of the accident.)

Before discussing the facts, it is worth asking whether this case, which involves the use of a small fishing skiff in a fact-specific context and which calls into question the possible *in rem* liability of the moored seine boat from

which the skiff was detached, raises any important questions of law justifying this Court's attention. The occasion for petitioners' claim is a collision during the unpermitted, illegal, intoxicated use at night of a small seine skiff for the operator's personal pleasure unrelated to the function or purpose of the vessel which petitioners attempt to hold liable *in rem*. This case does not arise from a mid-voyage diversion of a merchantman from her commercial purpose by a crew member, or from an error of a pilot or charterer charged with navigating it. This case presents no occasion for useful precedent. It bears no similarity to the EXXON VALDEZ-type scenario hypothesized by petitioners. And, given the likely significance of legal disputes arising out of the EXXON VALDEZ scenario petitioners hypothesize, those legal disputes should not be prematurely resolved or anticipated in a case of doubtful legal importance.

Respondents do not see how the fact-specific decision below has "extremely broad social implications for the maritime industry. . . ." Petition at 15. This case concerns exceptional facts unlikely to recur. The dispute has already absorbed more appellate energy than is justified. This case is far from the mainstream of cases considering the scope of *in rem* liability. E.g., *The China*, 74 U.S. (7 Wall.) 53 (1868) (compulsory pilot); *Cavcar Co. v. M/V. Suzdal*, 723 F. 2d 1096 (3d Cir. 1983) (charterer deviated from the contract to carry the goods); *Logue Stevedoring Corp. v. The Dalzellance*, 198 F.2d 369 (2d Cir. 1952) (voluntary pilot); *United States v. Helen*, 164 F.2d 111 (2d Cir. 1947) (charterer's stevedore during unloading); *United Nations Children's Fund v. S/S Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1965) (charterer deviated from the charter

terms). The case is set apart by the unique diversion of the moored skiff to unpermitted, illegal, non-commercial and recreational use for the personal gratification of Russell McLinn.

The concept of *in rem* liability has long been recognized. *The Barnstable*, 181 U.S. at 467. This case justifies no development or explication of that concept. The limits of that concept will not be meaningfully advanced by reviewing the opinion below, and there is no pressing need to do so.

Nor did the court of appeals depart from the concept announced by this Court. It applied the concept correctly. It did not find (as petitioners imply) merely an unauthorized divergence from orders, or a departure from the scope of employment. The Ninth Circuit's discussion of the facts reveals it was considering the facts in terms of the standard announced by this Court. 892 F.2d at 767-68, Appendix B at 5-9. There is no reason to offer guidance to the court of appeals or the other federal courts. There is no conflict among the circuits, or even among Ninth Circuit panels, potentially requiring review.

**B. The Record Evidence Compels A Conclusion
There Was No "Lawful Possession".**

If the issue is reached, it will be essential to review the facts bearing on the issue of lawful possession. The court of appeals found that the record supported the district court's implicit finding Russell McLinn was not in lawful possession of the skiff. 892 F.2d 767-68, Appendix B at 7-8. The court of appeals noted that Russell McLinn's use of the skiff "was much more like that of a mutineer,

pirate, or thief than a charterer, pilot or stevedore." 892 F.2d at 768, Appendix B at 7. It also stated:

It is clear from the record that Russell did not have any authority from his father, William, to use the skiff. Use of the skiff was highly regulated and Russell required his father's permission to use the skiff. No one other than William McLinn possessed the authority to allow Russell to use the skiff.

Id.

The court of appeals noted that William McLinn and the rest of the F/V FJORD's crew flew to Seward on the Alaska mainland and Russell McLinn stayed behind (in Kodiak). 892 F.2d at 766, Appendix B at 3. Before leaving, both the owner and Joe Borg, the assigned skiff man on the F/V FJORD, told Russell to stay out of the skiff and not to touch it. 892 F.2d at 768, Appendix B at 8. The court of appeals also took note of the use to which Russell McLinn put the skiff:

[O]n the night of June 30th he used the skiff to attend a beach party on another island. Five others were riding in the McLinn skiff on its return from the party when the collision occurred. The McLinn skiff struck the Panamarioff skiff, resulting in the death of Patrick Churchill and injury to plaintiff Dale Carlough, both of whom were riding in the McLinn skiff. Russell McLinn was found to be intoxicated with alcohol and probably marijuana at the time of the accident.

892 F.2d at 766, Appendix B at 3-4. It further noted: "In addition, Russell's personal, recreational use of the skiff at night while under the influence of alcohol and probably marijuana, contrary to all expectations for the skiff's

use, supports the district court's implicit conclusion that Russell was not in lawful possession of the skiff." 892 F.2d at 768, Appendix B at 8.

Review of the substantial appellate record provides further factual support. Although Russell McLinn did not recall being told not to use the skiff, he knew he needed permission to use it, knew that with his father's departure there was no one to ask for permission, knew he did not have his father's permission, and knew he should not have used it. Appendix C, containing RT 357, 359, 360; R. McLinn Depo. 8. He was not entrusted with the operation of either the F/V FJORD or the skiff. He was allowed to stay on the F/V FJORD in the absence of the rest of the crew because he had not wanted to go to Seward. Appendix C, containing RT 558. He was at most a watchman for the skiff and the moored F/V FJORD while they were docked in the Kodiak harbor. Appendix C, containing W. McLinn Depo. 31; RT 285, 355, 496, 557-58. Although he had a few minor chores aboard the moored F/V FJORD (Appendix C, containing R. McLinn Depo. 55, 71; RT 355, 557-58), none required him to board or operate the skiff.

A watchman, even one who might use the skiff *in extremis* to save the master's property, does not come into "lawful possession" of the vessel for purposes of attending a beach party and operating the skiff while intoxicated. Such a person does not have that degree of responsibility that he can be considered in "lawful possession" when he, contrary to the owner's orders and expectations, and without express or implied permission to board or operate the skiff, takes the skiff for his exclusive, personal, recreational, non-piscatorial purposes and operates it illegally under the influence of alcohol and

possibly marijuana for no purpose benefitting the skiff, the seiner, or her owner and for no purpose relating to the commercial function of the F/V FJORD.¹ The others riding in the skiff (including Patrick Churchill and Dale Carlough) were not F/V FJORD crew members, but were merely recreational passengers. Appendix C, containing RT 383.

The lawful possession issue turns on facts in dispute in the district court and the court of appeals. Facts which petitioners claim are "undisputed", petition at 6, on closer examination may not be so clear, and in context, contrary inferences are permissible. Thus, an assertion that Russell McLinn was left "'in charge' of the seine vessel and all of equipage, with the keys to both the seine vessel and skiff in them", petition at 6, does not do justice to the subtlety of the factual disputes. William McLinn, on cross-examination, was asked whether Russell "was in charge of the skiff", but William drew the distinction: "He [Russell] was in charge of *taking care* of the boat." Appendix C, containing RT 559, emphasis added. He was not put in charge of the skiff to operate it. That William McLinn left the keys behind is not significant. A watchman might need them; moreover, no key was required to start the F/V FJORD. Appendix C, containing W. McLinn Depo. 36. Boats such as the skiff can be operated without a key. "You don't need a key to steal a boat." Appendix C, containing RT 558. Reviewing the lawful possession issue

¹ The court of appeals concluded that the district court "necessarily accorded greater weight" to respondents' evidence on the lawful possession issue. 892 F.2d at 768 n.3, Appendix B at 8 n.3.

requires careful scrutiny of the actual record, not merely the passages containing evidentiary highlights.

The petition, while couched ostensibly in terms of legal disputes, ultimately reargues and turns on the same fact disputes contested at trial and in multiple post-trial applications and on appeal and in multiple rehearing petitions in the Ninth Circuit.

C. The Skiff Was Not Equipage Of The F/V FJORD At The Time Of The Collision.

It is not necessary to reach the lawful possession issue if the skiff was not part of the F/V FJORD's equipage when the collision occurred. Russell McLinn was not in possession of the F/V FJORD itself at the time of the accident.

During seine operations, a seine skiff may be part of the equipage of a purse seiner. Distinguishable are the facts in equipage cases such as *In re Ocean Fisheries, Inc.*, 1931 A.M.C. 381 (E.D. Va. 1930) (seaman injured while handling a net aboard a purse boat during proper operations of the purse boat and the main vessel). In comparison, Russell McLinn's operation of the skiff at the time of the accident had nothing to do with the F/V FJORD or its prospective seining season.

The district court did not specifically decide whether the skiff was part of the equipage of the F/V FJORD, although it had previously held that the Chichenoff skiff was part of the equipage of the F/V SUPERSONIC. The court of appeals did not decide the equipage issue on

appeal when respondents raised it as an alternative ground for affirmance. 892 F.2d at 767, Appendix B at 6.²

If the lawful possession issue is to be reviewed, the equipage issue must be resolved first. Respondents suggest that even if Russell McLinn could be regarded as having been in lawful possession of the skiff itself, the facts require a conclusion that he had severed the work-a-day commercial relationship between the skiff and the F/V FJORD for purposes of his intoxicated, early morning joyride. The skiff was no longer part of the F/V FJORD's equipage at the time of the accident.

II. RESPONDENTS SATISFIED THE PRESUMPTION ESTABLISHED BY AS 05.25.040, IF THAT STATUTE APPLIES AT ALL.

Alaska Statute 05.25.040 imposes liability on watercraft owners for negligent operation of their watercraft when the watercraft are used with the owners' express or implied consent. The statute contains a presumption that the watercraft "is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his . . . son."

² After the trial court held the Chichenoff skiff was equipage of the SUPERSONIC, respondents no longer disputed the equipage issue at the trial level. Nonetheless, the Ninth Circuit could permissibly have decided the equipage issue as an alternative basis for affirming the trial court. Likewise, the equipage issue provides an alternative reason for denying the petition. The record evidence permits a full and fair consideration of the issue.

The district court found the statute was invalid because it conflicted with federal law. Although the Ninth Circuit also so held in its original opinion, 857 F.2d 571, its amended opinion affirmed only for the alternative reason that there was "ample record evidence" to support a conclusion that the statutory presumption had been rebutted. 892 F.2d at 769, Appendix B at 10.

Even if the record did not demonstrate that respondents successfully rebutted the presumption, this issue would raise no question of general importance sufficient to justify granting the petition. The legal question decided by the Ninth Circuit, whether the presumption was rebutted, is itself mundane and federally unimportant.

Moreover, answering that legal question necessarily requires review of the record to determine whether it contains sufficient evidence to conclude that Russell McLinn's operation was not "with the knowledge and consent of the owner." AS 05.25.040. Even though that review requires only a search for sufficient record evidence to permit reasonable minds to conclude that the presumed fact (knowledge and consent) does not exist, that search involves consideration of the same facts or sorts of facts discussed in Argument I. At least some of those facts are in dispute. Although respondents submit that those disputes are not necessarily material to the consent issue, petitioners would probably argue otherwise. Legal questions which may turn on factual disputes do not justify granting the petition in this case.

In any event, the decision below was correct. The court of appeals itself noted record evidence requiring a

conclusion the presumption had been rebutted and the inference had been overcome.

As noted above, William McLinn expressly directed his son to stay off the skiff while he was in Seward, and told Russell that he saw no reason to use the skiff in his absence. William McLinn could hardly have done more to dispel an inference that he either expressly or impliedly gave Russell his permission to use the skiff to travel to and from a drinking party on a nearby beach. When asked in deposition whether he was authorized to use the skiff, moreover, Russell McLinn replied: "Not that - no. I don't think so." Because we conclude that William McLinn neither expressly nor impliedly consented to Russell's use of the skiff for his "recreational pursuits," appellants' claim under the Alaska Owner Responsibility Statute must fail.

892 F.2d 769, Appendix B at 10. Other evidence in the record discussed in Argument IA above reinforces the conclusion of the court of appeals.

Petitioners argue they did not have the benefit of the presumption, because the trial court held the statute to be invalid. Respondents cannot see why this Court should review the decision below on a theory the district court might permissibly have chosen to infer the existence of consent from the father-son relationship. Respondents submit the trial court, in light of all the evidence, could not have permissibly inferred consent based on the father-son relationship. AS 05.25.100(4) defines "watercraft" to mean a vessel "devoted to recreational pursuits". *See also* AS 05.25.100(3), defining "operate". Respondents submit that there was no credible evidence supporting a conclusion William McLinn impliedly or

expressly consented to Russell's use of the skiff for purely recreational purposes. Consequently, the presumption could never have arisen in the first place. The presence of a dispute about whether the father expressly instructed his son not to use the skiff does not tend to establish that he impliedly or expressly gave his son permission to use the skiff recreationally under the facts present here. Even if there was no express *denial* of use, it does not follow that there may have been an express or implied *consent* to use.

Moreover, the court of appeals concluded the district court had necessarily accorded greater weight to respondents' evidence on the issue of lawful possession of the skiff, given the repeated efforts of petitioners to obtain liability on that ground. 892 F.2d 768 n.3, Appendix B at 8 n.3. It must have struck the Ninth Circuit that remand for purposes of taking a possible inference into account would have been an act of futility, given what it saw in the record and in the findings of fact and conclusions of law entered by the district court. It concluded "William McLinn could hardly have done more to dispel an inference that he either expressly or impliedly gave Russell his permission to use the skiff to travel to and from a drinking party on a nearby beach." 892 F.2d at 769, Appendix B at 10.

Certainly the doubtful effect of a possible inference on the owner consent issue is not sufficiently important to require review by this court.

The validity of the owner responsibility statute is a question of potential significance, but the amended opinion of the Ninth Circuit renders that issue unripe for

review by this Court. On the other hand, there would be no reason for remand for consideration of an inference of consent if this Court were alternatively to conclude that the statute creating the presumption was itself invalid. Although the statute's validity would potentially be an important issue, respondents submit that the best way to avoid an unnecessary (and unripe) constitutional issue is to deny the petition.

CONCLUSION

The court of appeals did not err in affirming the judgment in favor of William McLinn and the F/V FJORD. Petitioners have presented no reason justifying review by this Court of the amended opinion. The petition for writ of certiorari should be denied.

Respectfully submitted this 8th day of June, 1990.

GEORGE N. HAYES
DELANEY, WILES, HAYES,
REITMAN & BRUBAKER, INC.
Attorney for F/V FJORD,
William McLinn and
Russell McLinn, Respondents

APPENDIX A
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CARLISSA CHURCHILL, as the)
informal Administrator of)
the Estate of PATRICK)
CHURCHILL and DALE)
CARLOUGH,)

Plaintiffs,)

vs.)

The F/V FJORD, her engines,)
tackle, apparel, appliances,)
equipment, apparatus and)
furniture; WILLIAM McLINN,)
owner and operator of said)
F/V FJORD; RUSSEL McLINN;)
DAVID PANAMARIOFF,)

Defendants.)

In the Matter of the)
Complaint of WILLIAM McLINN,)
as owner of the F/V FJORD,)
her engines, tackle, boilers)
and equipment, for exoneration)
from, or limitation of)
liability.)

FINDINGS
OF FACT
and
CONCLUSIONS
OF LAW
(Filed
Apr. 24, 1986)

A80-038 CIV

The above cause came before the court for entry of findings of fact and conclusions of law upon the issues of liability, and limitation of liability. Trial to the court was held March 10-13, 1986.

Therefore, upon full consideration of all the evidence in the case and upon the preponderance of evidence as the court has determined it, the court enters its

FINDINGS OF FACT

1. On June 30, 1979, shortly before 1:20 a.m., two skiffs collided near [sic] the City of Kodiak, Alaska. This accident occurred in the waters between the Cyane rock bouy [sic] and the entrance to the Near Island Channel. One skiff had exited the Near Island Channel and was proceeding generally in a northbound direction; it was operated by defendant David Panamarioff. The other skiff was returning from a beach party on Near Island and was proceeding generally in a southbound direction; it was operated by defendant Russel McLinn.

2. Patrick Churchill died as a result of injuries suffered at the time of the accident. Dale Carlough was injured.

3. The Panamarioff skiff was a Boston Whaler. It is a characteristic of this type of skiff to ride flat to the water at cruising speed. David Panamarioff was operating his skiff at a cruising speed of about 15 to 20 knots. It had no lights. David Panamarioff was alone in his skiff.

4. The Russel McLinn skiff was an aluminum work skiff. It is a characteristic of this type of skiff to ride with its bow elevated when operating at approximately 15 to 20 knots. Russel McLinn was operating his skiff at a speed of about 15 to 20 knots. It had no lights. Russel McLinn was transporting five others in his skiff. Some

were standing and were partially obstructing his forward view.

5. David Panamarioff used his Boston Whaler skiff for transportation, hunting, fishing and gathering firewood. It was his subsistence skiff. Mr. Panamarioff was returning to his home in the Native village of Ouzinkie on Spruce Island when the accident occurred.

6. The McLinn skiff was used primarily as a "seine skiff" in conjunction with the F/V FJORD. Joe Borg, a member of the F/V FJORD's crew, was the primary operator of the skiff. A few days prior to June 30 a new seventy (70) horsepower engine was installed on the skiff.

7. The accident occurred after sunset which was at 10:20 p.m. (daylight time) on June 29. The natural lighting was dusklike.

8. The Panamarioff skiff was within an area that was illuminated by the F/V EILEEN and the Whitney-Fidalgo cannery.

9. The McLinn skiff was just exiting an area of greater darkness.

10. It is the custom and practice in Kodiak for skiffs not to have the lights, although such lights are required by 72 COLREG 23(a) or (c)(i).

11. Prior to approximately 12:45 a.m. on June 30, David Panamarioff was in Tony's Bar in downtown Kodiak. He was in the bar for about forty-five (45) minutes to one hour with two friends. While there he consumed at least two and one-half beers. He then walked to his skiff in the small boat harbor and had a portion or all of another beer. More probably than not, David Panamarioff

was under the influence of alcohol at the time of the accident.

12. Russel McLinn was not a fully creditable witness. His testimony was evasive and his memory of events leading to the accident and immediately subsequent thereto obviously was slanted toward recall of the incident as such benefited him. In many major areas his testimony was not worth of belief.

13. Before the accident Russel McLinn had attended a beach party where intoxicating liquor was readily available. He also had smoked some quantity of marihuana [sic] prior to and more probably than not during the beach party. Russel McLinn was intoxicated at the time of the accident.

14. Because of intoxication, neither David Panamarioff or Russel McLinn exercised reasonable care prior to or at the time of the accident.

15. David Panamarioff and Russel McLinn were negligent, and their combined negligence was the cause of the accident.

16. No creditable evidence adequately supports plaintiffs' allegations that William McLinn, as owner and operator of the F/V Fjord, negligently entrusted the skiff involved in the accident to his son Russel McLinn.

17. No creditable evidence adequately supports plaintiffs' further allegations as to the liability of William McLinn, owner and operator of the F/V Fjord upon the doctrines of respondeat superior, family purpose, or in rem.

18. At the time of the accident tests indicated that Patrick Churchill had a blood alcohol content of .189%. He was severely intoxicated and his motor and mental abilities were severely impaired.

19. Because of his severe intoxication, Patrick Churchill violated the duty of reasonable care owed himself and others and therefore he was contributorily negligent.

20. Patrick Churchill's contributory negligence, combined with the negligence of Russel McLinn and David Panamarioff was the proximate cause of his death.

21. Shortly after the accident, Dale Carlough was treated at the Kodiak Island Hospital for alcohol intoxication and the injuries sustained in the accident. Creditable evidence establishes that he was very intoxicated.

22. Because of his intoxication, Dale Carlough violated the duty of reasonable care owed himself and others and therefore he was contributorily negligent.

23. Dale Carlough's contributory negligence, combined with the negligence of Russel McLinn and David Panamarioff was the proximate cause of his injuries.

24. The percent of comparative negligence of each of two plaintiffs and each of the three defendants is apportioned as follows:

Patrick Churchill	20%
Dale Carlough	20%
Russel McLinn	35%
David Panamarioff	25%
William McLinn and the F/V Fjord	0%

CONCLUSIONS OF LAW

1. This court has jurisdiction under the general maritime and admiralty law of the United States.

2. Russel McLinn was negligent.

3. David Panamarioff was negligent.

4. Patrick Churchill was contributorily negligent.

5. Dale Carlough was contributorily negligent.

6. William McLinn, owner and operator of the F/V Fjord and the F/V Fjord are not liable to plaintiffs under the doctrines of negligent entrustment, family purpose, respondeat superior, or in rem.

7. William McLinn, owner and operator of the F/V Fjord and the F/V Fjord are entitled to exoneration from liability.

8. The percent of comparative negligence of each party is that set forth in finding of fact #24.

Proposed judgment form upon the issues of liability and limitation of liability forthwith may be prepared by defendant William McLinn's counsel for presentation to the court.

Following entry of said judgment, any party may move to set the case for trial upon the issue of plaintiffs' damages.

DATED at Anchorage, Alaska, this 24th of April, 1986.

A-7

/s/ James A. Von der Heydt
United States District Judge

cc: Gerald W. Markham
Clay A. Young
Alan L. Schmitt
Gordon J. Tans
Arden E. Page
James S. Crane

APPENDIX B

Carlissa CHURCHILL, As the Informal Administrator of the Estate of Patrick Churchill; and Dale Carlough; Plaintiffs-Appellants,

v.

The F/V FJORD, her engines, tackle, apparel, appliances, equipment, apparatus and furniture, et al.; William McLinn, owner and operator of said F/V FJORD; Russell McLinn and David Panamarioff; Defendants-Appellees.

In the Matter of the Complaint of William McLINN, as owner of the F/V FJORD, her engines, tackle, boilers and equipment, for exoneration from, or limitation of liability.

In the Matter of the Complaint of Gilbert Jack JOHNSON and Jack Stewart Johnson, as owners of the F/V SUPERSONIC, her engines, tackle, boilers and equipment, and as owners of one certain Beck 15 foot fiberglass skiff, her engine, tackle and equipment, for limitation of liability.

No. 86-4178.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 1987.

Decided Sept. 14, 1988.

As Amended on Denial of Rehearing and
Rehearing En Banc Dec. 18, 1989.

Action was brought seeking damages for wrongful death and personal injury arising from collision of two skiffs. Following remand, 744 F.2d 677, the United States District Court for the District of Alaska, John A. Von der heydt, J., entered judgment in favor of fishing vessel from

which one of the skiffs was operated, and its owner. Plaintiffs appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) evidence supported finding that crew member operating fishing vessel's skiff was not in lawful possession so that vessel was not liable in rem for crew member's negligence; (2) fishing vessel owner neither expressly nor impliedly consented to use of skiff for recreational pursuits and thus was not liable under Alaska Owner Responsibility Statute; (3) there was no clear error in finding that skiff's lack of proper operating lights was not a cause of the accident; (4) there was no clear error in finding that vessel owner was not liable under theories of negligent entrustment or family purpose; but (5) District Court incorrectly compared each plaintiff's comparative negligence with the other, rather than separately with the defendants.

Affirmed in part, reversed in part, and remanded.

Opinion 857 F.2d 571, superceded.

Gerald W. Markham, Kodiak, Alaska, for plaintiffs-appellants.

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before HUG,* NORRIS and HALL, Circuit Judges.

Cynthia Holcomb HALL, Circuit Judge

*Judge Hug was drawn to replace Judge Anderson, who died while this appeal was pending. Judge Hug has read the briefs, reviewed the record and listened to the tape of oral argument.

Plaintiffs-appellants Churchill and Carlough sue for wrongful death and personal injury arising from the navigation of three skiffs, two of which collided. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1333(1) and exercised pendent jurisdiction over plaintiffs' state law claim. The court, after a bench trial, entered judgment in the liability phase of the trial in favor of defendants-appellees William McLinn and the F/V Fjord. Appellants appeal to this court, asserting numerous grounds for reversal. We affirm in part, reverse in part, and remand.

I

A collision of two skiffs occurred outside the entrance to the channel between Near Island and Kodiak Island, Alaska at approximately 1:20 a.m. on June 30, 1979. The channel generally runs in a north-south direction. One craft, operated and occupied only by David Panamarioff (the Panamarioff skiff) was headed in a northerly direction. The other craft, operated by Russell McLinn (the McLinn skiff), was headed in a southerly direction. Russell McLinn was a crew member of the F/V Fjord owner and master, William McLinn. Several days prior to the collision, William McLinn and the rest of the Fjord's crew flew to Seward on the mainland. Russell stayed behind, and on the night of June 30th he used the skiff to attend a beach party on another island. Five others were riding in the McLinn skiff on its return from the party when the collision occurred. The McLinn skiff struck the Panamarioff skiff, resulting in the death of Patrick Churchill and injury to plaintiff Dale Carlough, both of whom were riding in the McLinn skiff. Russell

McLinn was found to be intoxicated with alcohol and probably marijuana at the time of the accident.

At the time of the collision, Michael Chichenoff was navigating a similar seine skiff (the Chichenoff skiff) in approximately the same direction and at approximately the same speed as the Panamarioff skiff. Three passengers occupied the Chichenoff skiff: Lori Chichenoff, Walter Haakanson and Dan Woods. The Chichenoff skiff was to the right of the Panamarioff skiff at a distance variously estimated to be from eight yards to as much as 100 yards.

Panamarioff had been experiencing engine difficulties and was headed home to the nearby village of Ouzinkie on Spruce Island when the accident occurred. Chichenoff had agreed to accompany his friend Panamarioff through the channel to insure that Panamarioff would not be stranded should his engine malfunction. There was no contact between the Chichenoff skiff and either of the other skiffs. None of the skiffs had night running lights and all were allegedly traveling at high speeds in violation of local ordinances.

Chichenoff operated a seine skiff of the salmon fishing vessel F/V Supersonic. The McLinn skiff was used for a similar purpose in conjunction with the F/V Fjord, a purse seiner. The fishing vessels were moored in Kodiak during the temporary closure of the salmon fishery. Plaintiff's suit against the F/V Supersonic and her owners was settled prior to trial.¹

¹ Plaintiff's suit against defendant-appellee David Panamarioff was settled while this appeal was pending.

The district court entered an order granting summary judgment to Churchill and Carlough against Panamarioff and Russell McLinn jointly and severally, with the application of a specific comparative negligence formula and with the damages to be determined in a subsequent trial. The court ordered dismissal of the plaintiffs' claim for punitive damages and dismissal of the claims against William McLinn and the F/V Fjord. The court directed the entry of final judgment under Fed.R.Civ.P. 54(b).

II

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed.R.Civ.P. 52(a); *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir.1985). Under the clearly erroneous standard of review an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948); *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir.1985). Questions of law are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

III

Appellants assert that the F/V Fjord is liable *in rem* for the torts of Russell McLinn in his operation of the Fjord's skiff. To establish the F/V Fjord's *in rem* liability, appellants must show that the skiff is part of the F/V

Fjord's "equipment" and that Russell McLinn was "in lawful possession" of the skiff. See *The Barnstable*, 181 U.S. 464, 467, 21 S.Ct. 684, 685, 45 L.Ed. 954 (1901) ("the law in this country is entirely well settled that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer"); *Complaint of McLinn*, 744 F.2d 677, 680 (9th Cir.1984); G. Gilmore & C. Black, *The Law of Admiralty*, § 9-18 at 615 (2d ed. 1975) ("Gilmore & Black").

The district court dismissed appellants' *in rem* claim against the Fjord, finding that no credible evidence adequately supported plaintiffs' allegations. In order to conclude that the Fjord was not liable *in rem*, the district court must have found either that the skiff is not part of the Fjord's equipment or that Russell McLinn was not in lawful possession, or both. Thus, we may affirm the district court's conclusion of no *in rem* liability if either possible implicit finding is not clearly erroneous.

Because appellants must show both that the skiff is part of the equipment of the F/V Fjord and that Russell McLinn was in lawful possession of the skiff to establish *in rem* liability, we need not reach the equipment question in order to affirm the district court's ruling that there is no *in rem* liability.² We affirm the district court solely on

² The district court did not specifically decide whether the McLinn skiff was part of the equipment of the F/V Fjord, although it did hold that the Chichenoff skiff was part of the equipment of the F/V Supersonic. Although there is no indication in the record that the district court did not consider the McLinn skiff to be part of the equipment of the Fjord, the parties are in dispute on this issue and we need not resolve it.

the basis that the evidence in the record supports an implicit finding that Russell McLinn was not in lawful possession of the Fjord's skiff. See *Beezley v. Fremont Indemnity Co.*, 804 F.2d 530, 530 n. 1 (9th Cir.1986), *cert. denied*, 480 U.S. 949, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987) ("we may affirm the district court on any basis fairly supported by the record").

Under the doctrine of *in rem* liability, charterers, pilots and stevedors are considered to be in lawful possession, whereas pirates, mutineers and "like" people are not. Gilmore & Black, § 9-10 at 601. As discussed by Gilmore & Black, the *Barnstable* rule of lawful possession should be viewed as creating liability where the owner of the vessel has entrusted control to a third party. Gilmore & Black, § 9-18 at 621; see *Complaint of McLinn*, 744 F.2d at 685 (implying that vessel owner's consent to the use of the vessel's skiff in activities not involving the employee's duties is relevant to a finding of lawful possession); *Cavcar Co. v. M/Z Suzdal*, 723 F.2d 1096, 1101 (3d Cir.1983). Thus, the rule requires that the vessel's owner give some degree of consent or authorization to the third party.

Despite Russell McLinn's status as a member of the Fjord's crew, the record supports the district court's implicit finding that he was not in lawful possession of the skiff. His use of the skiff was much more like that of a mutineer, pirate, or thief than a charterer, pilot, or stevedore. It is clear from the record that Russell did not have any authority from his father, William, to use the skiff. Use of the skiff was highly regulated and Russell required his father's permission to use the skiff. No one other than William McLinn possessed the authority to allow Russell to use the skiff.

When leaving the Fjord for his flight to Seward, both William McLinn and Joe Borg, the skiffman on the Fjord, told Russell to stay out of the skiff and not to touch the skiff. William admonished his son that he saw no reason for Russell to use the skiff while he was gone. In addition, Russell's personal, recreational use of the skiff at night while under the influence of alcohol and probably marijuana, contrary to all expectations for the skiff's use, supports the district court's implicit conclusion that Russell was not in lawful possession of the skiff.

Although the district court did not make an express finding on the issue of lawful possession in rejecting appellants' *in rem* claim, the evidence in the record supports an implicit finding that Russell was not in lawful possession of the McLinn.³ Therefore, the Fjord is not

³ After the district court entered its findings of fact and conclusions of law, appellants twice moved the court to amend its findings and judgment on the issue of lawful possession. The district court again was presented with both the appellants' and the appellees' evidence on the issue. Appellees' evidence at trial consisted primarily of the testimony of William McLinn and Joe Borg, but also included testimony by Russell McLinn.

By refusing to amend its findings, it is clear that the district court again rejected appellants' claim that Russell was in lawful possession of the skiff. Consequently, we conclude that the district court necessarily accorded greater weight to appellees' evidence. We will not second-guess that assessment of credibility. *United States v. Gomez*, 846 F.2d 557, 560-61 (9th Cir. 1988) ("We cannot second-guess trial court findings that depend on explicit or implicit credibility assessments unless the findings are unsupported by the record.").

liable *in rem* for Russell McLinn's negligence in operating the skiff.

IV

The dismissal of appellants' claim against William McLinn under the Alaska Owner Responsibility Statute, AS § 05.25.040, is reviewed *de novo*. *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir.1984) (en banc). The district court dismissed this pendent state law claim on the basis of federal preemption. We affirm the district court, but do so on a different ground which is fairly supported by the record. *See Beezley*, 804 F.2d at 530 n. 1.

A

Section 05.25.040 provides that:

the owner of a watercraft is liable for injury or damage caused by the negligent operation of his watercraft. . . . The owner is not liable, however, unless his watercraft is used with his express or implied consent. It is presumed that his watercraft is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of his . . . son.

"Watercraft" is defined by AS § 05.25.100(4) to mean "every description of vessel . . . used or capable of being used as a means of transportation on water and devoted to recreational pursuits."

In light of this court's holding in *Complaint of McLinn*, it is apparent that the McLinn skiff falls within the coverage of section 05.25.040. *See* 744 F.2d at 683 (non-documented vessels temporarily devoted to recreational

pursuits are "watercraft" within meaning of Alaska Owner Responsibility Statute). William McLinn cannot be held liable for the injury caused by his son's negligent operation of the skiff, however, unless his watercraft was used with his express or implied consent. AS § 05.25.040.

Although consent may be presumed if the watercraft was under the control of the owner's son at the time of the injury, *id.*, there is ample record evidence to support a conclusion that the presumption was rebutted in this case. As noted above, William McLinn expressly directed his son to stay off the skiff while he was in Seward, and told Russell that he saw no reason to use the skiff in his absence. William McLinn could hardly have done more to dispel an inference that he either expressly or impliedly gave Russell his permission to use the skiff to travel to and from a drinking party on a nearby beach. When asked in deposition whether he was authorized to use the skiff, moreover, Russell McLinn replied: "Not that - no. I don't think so." Because we conclude that William McLinn neither expressly nor impliedly consented to Russell's use of the skiff for his "recreational pursuits," appellants' claim under the Alaska Owner Responsibility Statute must fail.

B

Because we have rejected appellants' pendent state law claim under the Alaska Owner Responsibility Statute on its merits, we must also decide whether the district court erred by striking appellants' jury trial demand from the complaint. Entitlement to a jury trial in federal court is a question of law freely reviewable. *Standard Oil Co. of*

California v. Arizona, 738 F.2d 1021, 1022-23 (9th Cir.1984), cert. denied, 469 U.S. 1132, 105 S.Ct. 815, 83 L.Ed.2d 807 (1985).

Appellants assert that the pendent state law claim under AS § 05.25.040 entitles them to a trial by jury. The district court rejected this argument, citing the Fifth Circuit's opinion in *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1287 (5th Cir. 1985), rev'd on other grounds, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986), on remand, 800 F.2d 1390 (1988). In *Tallentire*, the court held that where a state law claim is in federal court solely by virtue of admiralty jurisdiction, plaintiffs are not entitled to a jury trial. *Id.* Although at first blush such a rule seems harsh, to hold otherwise would contravene the manifest purpose of Federal Rule of Civil Procedure 38(e) by allowing jury trials in admiralty cases in which plaintiffs allege a pendent state law claim. See also *Ashland Oil v. Third Nat. Bank of Ashland, Ky.*, 557 F.Supp. 862, 872 (E.D.Ky.1983) (no right to jury trial on common law cross-claim in action in which admiralty is sole basis of jurisdiction).

Appellants argue, however, that the general rule of no jury trials in admiralty cases should be disregarded when a plaintiff is forced into federal court by defendant's limitation action under 46 U.S.C. § 181-89. Appellants further assert that our decision in *Complaint of Paradise Holdings Inc.*, 795 F.2d 756, 763 (9th Cir.), cert. denied, 479 U.S. 1008, 107 S.Ct. 649, 93 L.Ed.2d 705 (1986) (district court has discretion to stay related state court proceedings while hearing action brought under Limitation Act), precludes plaintiffs from proceeding in state court in the face of a limitation action in federal court.

Appellants' arguments might have force if, having chosen a forum or pled claims on which a jury trial was available, they were forced into a court of admiralty by appellees. This was not such a case. The appellants here selected the federal forum in the first instance, and repeatedly designated their complaint as arising in admiralty. In these circumstances, we agree with the district court, and with the Fifth Circuit, that appellants were not entitled to a jury trial on their pendent claim under the Alaska Owner Responsibility Statute.

V

It was undisputed in the court below that the McLinn skiff did not have proper operating lights, in violation of, *inter alia*, 46 C.F.R. § 25.05-1 (1982). This violation establishes statutory fault on the part of the skiff, and serves as a basis for *in rem* liability of the F/V Fjord. See *Complaint of McLinn*, 744 F.2d at 680. Once statutory fault is established, the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), places the burden of exoneration on appellees to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." *Id.* 86 U.S. at 136.

The district court held as a matter of law that the lack of lights was not a cause of the accident. This court reviews a finding of proximate cause, or lack thereof, for clear error. *Armstrong v. United States*, 756 F.2d 1407, 1409 (9th Cir.1985); see *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 827 (9th Cir.1988) ("We review the district court's application of facts to *The Pennsylvania* rule under the clearly erroneous standard."). Testimony at trial was

that the natural lighting was "dusk-like," although the qualities inherent in this term were disputed by the parties. Although the McLinn skiff was leaving an area of greater darkness relative to the illumination surrounding the Panamarioff skiff, Chichenoff testified the McLinn skiff was "pretty clear" to him approximately thirty seconds prior to the collision. Haakanson, a passenger in the Chichenoff skiff, discussed with Chichenoff the approaching McLinn skiff thirty to forty seconds prior to the collision.

Although the district judge termed Russell McLinn's testimony incredible in many major areas, Russell testified he saw the Chichenoff skiff approximately a minute before impact. Panamarioff, who was intoxicated, was distracted by his balky outboard motor. Witnesses testified Panamarioff was looking back at his engine just before the collision. Russell McLinn also testified to this. Panamarioff himself admitted that he looked up immediately prior to the collision to see the oncoming McLinn skiff. Although the facts are disputed with respect to whether Panamarioff was viewing forward so that lights could have warned him of the closing McLinn skiff, the district court did not clearly error in refusing to so find.

In construing the rule of *The Pennsylvania*, this court has held that the vessel statutorily at fault has the burden of establishing the violation "could not reasonably be held to have been a proximate cause of the collision." *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 749 (9th Cir.1960). More recently, we held that "the burden imposed under *The Pennsylvania* rule is discharged by a clear and convincing showing of no proximate cause, rather than the stricter test of beyond a reasonable

doubt." *Trinidad Corp.*, 845 F.2d at 825.⁴ Applying this standard, the evidence supports the district court's finding that the absence of lights was not a proximate cause of the accident.⁵

VI

Although the district court did not expressly address the question whether Russell McLinn was required to blast a sound signal, the fact findings of the court below dispose of the issue.

Appellants assert that the collision actually took place within the channel between Near Island and Kodiak Island and that the vision between the approaching vessels was obscured by an intervening obstruction, a large

⁴ We note that our decision in *Trinidad Corp.* reexamined *States S.S. Co. v. Permanente S.S. Corp.*, 231 F.2d 82 (9th Cir.1956). In *Permanente S.S. Corp.*, we held that the rule of *The Pennsylvania* requires the vessel statutorily at fault to "prove beyond reasonable doubt that the collision would [nonetheless] have occurred." *Id.* at 87 (emphasis added) (quoting *Oriental Trading & Transp. Co. v. Gulf Oil Corp.*, 173 F.2d 108, 109 (2d Cir.), cert. denied, 337 U.S. 919, 69 S.Ct. 1162, 93 L.Ed. 1729 (1949)). We are bound by our decision in *Trinidad Corp.*, which reexamined our earlier decisions in light of subsequent Supreme Court precedent. 845 F.2d at 825 n. 5. See, e.g., *Heath v. Cleary*, 708 F.2d 1376, 1378 n. 2 (9th Cir.1983) ("Where . . . a Supreme Court decision has effectively undermined prior Ninth Circuit precedent, a [three-judge panel is] free to reexamine those earlier cases to determine their continuing validity.")

⁵ We note that this court in a prior appeal also agreed with the district court on this issue with respect to Chichenoff's negligence. *Complaint of McLinn*, 744 F.2d at 684 n. 3.

bluff at the entrance to the Near Island channel. Because of the obstruction, appellants argue, a sound signal was required by law. 72 COLREGS (International Regulations for Preventing Collisions at Sea) 9(a)(f), or 34(e).

There is ample evidence in the record to support not only the district court's finding that the collision took place outside the channel entrance, but also that the advancing skiffs were visually aware of each other. Therefore, no intervening obstruction obscured the skiffs from their operators' field of vision and no sound signal was required.

VII

The district court held that William McLinn was not liable to plaintiffs under the doctrine of negligent entrustment. The doctrine of negligent entrustment is embodied in Restatement (Second) of Torts § 390 (1965), and both parties agree that § 390 should apply to suits in admiralty. See *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design*, 565 F.2d 1129, 1133-34 (9th Cir.1977). Section 390 provides that one who supplies a chattel for another's use whom the supplier "knows or has reason to know" is likely to use the chattel in a manner "involving unreasonable risk of physical harm to himself and others" is subject to liability for the physical harm resulting to them. Restatement (Second) of Torts § 390. To prevail on this theory, appellants must show that William McLinn supplied the skiff directly to his son, and must have known or should have known that Russell would be likely to use the skiff in a dangerous manner. This court reviews for clear error whether a duty of care has been

breached. *Eichelberger v. NLRB*, 765 F.2d 851, 856 (9th Cir.1985); *Armstrong*, 756 F.2d at 1409.

First, there is ample evidence to support the conclusion that William McLinn did not "supply" the skiff to his son for his use. As noted above, Russell McLinn did not have permission to use the skiff, and, according to his father, Russell did not use the skiff in the past without his father's permission. Second, there is enough evidence in the record for the district court to find that William McLinn did not know or have reason to know that his son would operate the skiff in a harmful manner. Russell McLinn had not previously disobeyed his father on any serious matter or given his father any reason to believe he would disobey instructions not to use the skiff. Further, William McLinn had observed his son using the skiff and believed he was a competent operator. Prior to the collision, William McLinn had never seen his son drunk or under the influence of alcohol or marijuana, although the evidence at trial on this point was conflicting. In addition, William McLinn testified he was unaware of Russell's legal problems with marijuana, driving while intoxicated charges, or juvenile problems in Hawaii. The district court did not clearly err.

VIII

The district court found no creditable evidence adequately supported appellants' allegations that William McLinn was liable under the doctrine of family purpose. The evidence supports the district court's conclusion that liability could not be predicated on the family purpose doctrine. Although as appellants assert, the bases of the

court's finding may be ambiguous, there is evidence indicating that the F/V Fjord was not simply a family activity, but was part of a commercial enterprise. Further, as the facts described above show, Russell McLinn's use of the skiff on June 30, 1979 is not consistent with any conceivable family purpose.

IX

Appellants assert that the district court erred in sustaining objections to appellants' attempts to introduce evidence concerning Russell McLinn's reputation for delinquency. Appellants argue such evidence is relevant to the issue whether William McLinn knew or should have known his son would use skiff in a dangerous manner. Therefore, appellants contend that the district court's rejection of the negligent entrustment claim must be reversed as a result of the error. This court reviews evidentiary rulings for an abuse of discretion. *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1333 (9th Cir.1985).

We hold that the district court did not abuse its discretion in excluding the evidence. It was clearly in the district court's discretion to decide whether the evidence appellants sought to admit was relevant under Federal Rule of Evidence 401, or outweighed by its potential prejudice and its potential for wasting the court's time. Fed.R.Evid. 403. *See id.* at 1333-35, 1339-40. Further, appellants did not suffer any prejudice as a result of the alleged error. Appellants questioned William McLinn extensively about his son's behavior, and similar evidence to that excluded was admitted.

X

Appellants contend that the district court erred in refusing to award punitive damages against Russell McLinn. Punitive damages are available under the general maritime law and may be imposed for "conduct which manifests 'reckless or callous disregard' for the rights of others or for conduct which shows 'gross negligence or actual malice or criminal indifference.'" *Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir.1985) (citations omitted).

The district court found that, although Russell McLinn did not exercise reasonable care, there was no creditable evidence that he acted wilfully, recklessly, maliciously, or with gross negligence. This finding is reviewable for clear error. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987). Upon a careful review of the record, we hold that the district court could properly find that, notwithstanding Russell's intoxication, he did not act with a "reckless or callous disregard for the rights of others" or with "gross negligence or actual malice or criminal indifference." *Protectus Alpha Navigation Co.*, 767 F.2d at 1385.

XI

The district court erred with respect to its comparative fault allocations. The court below incorrectly compared each plaintiff's comparative negligence with the other. The district court held that the percentage of comparative negligence "of each of the two plaintiffs and each of the three defendants is apportioned as follows: Patrick Churchill - 20%; Dale Carlough - 20%; Russell

McLinn - 35%; David Panamarioff - 25%; William McLinn and the F/V Fjord - 0%." The district court, however, should have compared each plaintiff's negligence separately with the defendants. We reverse and remand on this issue for proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

FRANK CHURCHILL, as the)	
Informal Administrator of the)	
Estate of PATRICK CHURCHILL,)	
and DALE CARLOUGH,)	
)	
Plaintiffs,)	No. A80-038
)	Civil
vs.)	
The F/V FJORD, her engines)	
tackle, apparel, appliances,)	
equipment, apparatus and)	
furniture; WILLIAM MCLINN,)	
DAVID PANAMARIOFF; The F/V)	
SUPERSONIC, her engines,)	
tackle, apparel, appliances,)	
equipment, apparatus and)	
furniture; GILBERT JOHNSON,)	
part owner and/or operator of)	
said F/V SUPERSONIC; Jack)	
JOHNSON, part owner of said)	
F/V SUPERSONIC; and MICHAEL)	
BRUCE CHICHENOFF,)	
)	
Defendants.)	

DEPOSITION OF RUSSELL MCLINN

PURSUANT TO NOTICE, the deposition of RUSSELL MCLINN was taken on Monday, the fifth day of January, 1981, commencing at the hour of 9:00 a.m., thereof, before DEBORAH L. SOUCY, Notary Public in and for the STATE of Alaska, and Electronic Reporter for Island Secretarial Service, at the office of Island Secretarial Service, in Kodiak, Alaska.

* * *

(p. 8) A. Yes.

Q. So you were the only person in town at the time of the accident?

A. Yes.

Q. Who was in charge of the boat then?

A. You might say I was, watching the boat, making sure it stayed afloat.

Q. Did your father give you any instructions? Your father was the skipper?

A. Yes.

Q. Did your father give you any instructions with regard to caring for the boat when he left?

A. Not that I can remember no. Just, you know, check the pumps and make sure it's plugged in, the electricity, batteries charged up and that.

Q. All right . . .

A. That's all I can remember, think of.

Q. Were you authorized to use the boat's skiff?

A. Not that - no. I don't think so.

Q. Were you told you couldn't use the boat's skiff?

A. I know better, you know, I know I shouldn't have used the skiff, but I did.

Q. Were you ever told you couldn't use the skiff?

A. Not at any specific time that I can remember. No.

Q. All right, directing your attention now to the night of

* * *

(p. 55) Q. Did he ever say you couldn't run the skiff at night?

A. No.

Q. And what was the purpose of that skiff? What was it being used for with the FJORD?

A. Seining. Salmon seining.

Q. Is that . . .

A. Tie one end of the seine around to the other end of the boat.

Q. Did it have an identifying number or anything like that? The skiff?

A. I'm not sure. I think it does.

Q. What instructions did your father give you when he left for Seward, if any? About the boat other than pumping it out.

A. Keep the bilge - keep the battery charged up and that's basically it.

Q. Did you ever been left in charge of your father's boat before?

A. Maybe now and then, just for a little bit. Week or two.

Q. While your father was out of town?

A. Yeah.

Q. How long had your father been gone before the accident?

A. I believe a week and a half, two weeks. He was due back at any time. The season was about to open.

Q. How fast would that boat of yours go?

* * *

(p. 71) A. It would be that day. That morning we woke up together.

Q. Where were you?

A. Oh, no, maybe it wasn't that morning. Excuse me. I slept on the boat the night before. And I woke up on the boat, and had worked on the boat because I was supposed to paint the boat. Just paint the inside of the boat. I don't recall where Pat stayed, or where he had stayed that night, but we had usually stayed together.

Q. You described him as your best friend. What sorts of things did you do together?

A. Just about everything.

Q. Did he work on the boat with you?

A. No, he worked in the cannery.

Q. When you say everything, you mean in your liesure hours?

A. Yeah, liesure, hours, yes.

Q. You didn't work together?

A. No, we'd all worked there previously together, at the same cannery.

Q. What sorts of things would you and Pat Churchill do with your liesure time?

A. Frisbee, ah, frisbee pretty much. Frisbee, run around, wasn't much to do. Sit around at home all day.

Q. Was Dale Carlough also a pretty close friend of yours?

A. Yeah.

Q. Did he spend a lot of time with you and Pat during your

* * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

FRANK CHURCHILL, as the)
Informal Administrator of the)
Estate of PATRICK CHURCHILL,)
and DALE CARLOUGH)

Plaintiffs,)

vs.)

No. A80-038
Civil

The F/V FJORD, her engines,)
tackle, apparel, appliances,)
equipment, apparatus and)
furniture; WILLIAM McLINN,)
owner and operator of said)
F/V FJORD; RUSSELL McLINN,)
DAVID PANAMARIOFF; The F/V)
SUPERSONIC, her engines,)
tackle, apparel, appliances,)
equipment, apparatus and)
furniture; GILBERT JOHNSON,)
part owner and/or operator of)
said F/V SUPERSONIC; JACK)
JOHNSON, part owner of said)
F/V SUPERSONIC; and MICHAEL)
BRUCE CHICHENOFF,)

Defendants.)

In the Matter of the Complaint)
of WILLIAM McLINN, as owner)
of the F/V FJORD, her)
engines, tackle, boilers and)
equipment for exoneration)
from, or limitation of)
liability)

No. A80-250
Civil

IN ADMIRALTY

In the Matter of the Complaint)	
of GILBERT JACK JOHNSON and)	
JACK STEWART JOHNSON, as)	No. A80-321
owners of the F/V)	Civil
SUPERSONIC, her engines,)	
tackle, boilers and)	IN ADMIRALTY
equipment, and as owners of)	
one certain Beck 15 foot)	
fiberglass skiff, her engine,)	
tackle and equipment, for)	
exoneration from, or)	
limitation of liability)	
<hr/>		

DEPOSITION OF WILLIAM McLINN

APPEARANCES:

For Plaintiff: GERALD MARKHAM, ESQ.
Box 806
Kodiak, AK 99615

For Defendants F/V *Fjord* and William McLinn:

MICHAEL MOXNESS, ESQ.
Delaney, Wiles, Hayes, Reitman
& Brubaker
1007 West 3rd Avenue
Anchorage, AK 99501

For Defendants F/V *Supersonic*, Jack Gilbert
Johnson, and Stewart Jack Johnson:

JAMES M. POWELL, ESQ.
Hughes, Thorsness, Gantz,
Powell & Brundin
509 Third Avenue
Anchorage, AK 99501

For Defendant Michael Chichenoff:

NELSON G. PAGE, ESQ.
Burr, Pease & Kurtz, Inc.

810 N Street
Anchorage, AK 99501

Also Present: Jack Gilbert Johnson
Stewart Jack Johnson

PURSUANT TO NOTICE, the deposition of WILLIAM McLINN was taken on the 10th day of December, 1981 commencing at the hour of 10:30 a.m., thereof, before Deborah L. Soucy, Notary Public in and for the State of Alaska and electronic reporter for Island Secretarial Services at the office of Island Secretarial Services in Kodiak, Alaska.

* * *

(p. 31) A. I was there.

Q. Do you remember him telling – testifying that you gave no specific instructions with regard to uh –

A. I don't recall it.

Q. All right. Do you know if he heard you?

A. I would say he did.

Q. How do you know that?

A. There was three people right beside me, they heard me.

Q. Who were they?

A. Joe Berg – two people beside me, Joe Berg and Kristopher.

Q. Kristopher?

A. My son. K.

Q. Kris, K. Is that all you told him?

A. That was my leaving words, right.

Q. What was his function in your absence supposed to be?

A. To see that the boat didn't sink or burn up.

Q. Did this require his constant presence on the boat?

A. I believe not.

Q. Did that really even require anyone's presence in Kodiak? Could all three of you have left?

A. All three of us could have left.

Q. Have you left vessells like that unattended before?

A. It's unattended now.

Q. Where is the boat now?

* * *

(p. 36) Q. Did your son know where those keys were?

A. I would assume so.

Q. You didn't hide them?

A. No.

Q. Was there a key for the seine boat as well?

A. No.

Q. You start that without a key?

A. Right.

Q. Did your son know how to do that?

A. Yes.

Q. Could he move - was he capable of moving the boat if necessary?

A. If necessary. I believe so.

Q. And one of his duties was to see the boat didn't burn?

A. I just left him there.

Q. Did he have any duties or did he have the duty to see that the boat didn't sink and burn like you testified to?

MR. MOXNESS: Objection: it's argumentative.

A. We took a week off vacation . . .

MR. MARKHAM: I see.

A. . . . and got our work done. He chose to stay in town. He had no place of residence since he had given it up. He was staying on the boat as a crew member.

* * *

(RT 272) MR. YOUNG: Which I don't know what they are yet. So I don't really know what his case is.

THE COURT: So we then turn to your case. Are you going to call this man? Is he your first witness?

MR. YOUNG: He would be my first witness.

THE COURT: Call him.

MR. YOUNG: Well, he's in the witness room.

THE COURT: I'll hear it.

(Pause.)

Would you come forward, please? Just come around this way, through this gate. And then if you'll walk around in front of this gentleman, he'll administer an oath.

JOSEPH A. BORG, DEFENDANTS' WITNESS,
SWORN

THE CLERK: Sir, for the record, would you state your full name, and please spell your last name.

THE WITNESS: Joseph Anthony Borg, B-o-r-g.

THE COURT: Counsel?

THE CLERK: And your address, sir?

THE COURT: Oh, I'm sorry.

THE WITNESS: 312 Almaden Way, San Mateo, California.

THE CLERK: Do you have a zip code, sir?

THE WITNESS: Pardon me?

THE CLERK: Do you have a zip code?

THE WITNESS: 94403.

THE CLERK: Thank you.

* * *

(RT 285) conversation?

- A. We were on the dock, just leaving. It was like a, you know, "Stay on the boat, be good, don't touch the skiff, and we're leaving. See you later." Basically

that's what it was. It wasn't - you know, we didn't rehearse that or anything like that. So - calm, and everything.

Q. And was anyone else present when - on the dock?

A. Just us, the crew, as far as I remember. You know, there was probably other guys walking around, but I don't remember -

Q. Well, was Chris there?

A. Yeah.

Q. And then you and Bill and Chris left to get on the plane.

A. Yep.

Q. Russel stayed there.

A. Yeah.

Q. What was Russel, if you know, what was he to be doing -

A. Just keep an eye on -

Q. - with the boat?

A. Keep an eye on the boat, you know, so nobody stole anything, basically. And just make sure the battery stayed up so the pump would pump the water out.

Q. Do you know if he was living on the boat?

A. I figured he was. He wouldn't have anywhere else to live on Kodiak then.

Q. Had you ever - before this time, before you went to

* * *

(RT 330) still under oath, Mr. McInn. So just be seated.

WILLIAM RUSSEL McLINN RECALLED AS
DEFENDANTS' WITNESS
DIRECT EXAMINATION

BY MR. YOUNG:

Q. Russel, how old are you?

A. I'm approximately 25 right now.

Q. Approximately?

A. Yeah. I little after.

Q. When's your birthday?

A. 3-4-61.

Q. Okay.

A. March 4th.

Q. March 4th, 1961?

A. Yeah.

Q. And were [sic] do you live now?

A. In Wasilla.

Q. All right. And are you employed?

A. Yes, I - well - I am, yes.

Q. What's your job?

A. I work with H&H Sales building prefab houses.

Q. Where were you born, Russel?

A. Kodiak, Alaska.

Q. And who is your father?

A. Bill McLinn.

Q. Who's your mother?

* * *

(RT 355) Q. And why didn't you go with them?

A. 'Cause my place of residence was Kodiak.

Q. Okay. Did they all leave together?

A. As far as I know the three of them left together, yes.

Q. The three of them being Joe Borg, William McLinn -

A. Yes. And my brother Chris, right.

Q. And were you told anything when they left, that you can recall, about anything to do with the FJORD or the skiff?

A. The only thing I remember being told before they left was to keep up the boat, paint the floorboards, the deck boards, and whatnot. That kind of thing.

Q. Okay. Paint the floorboards, and -

A. Just work on the boat.

Q. Work on the FJORD?

A. I don't specifically remember them telling me not to use the skiff.

Q. Okay.

A. But – I don't remember, really.

Q. Okay. And do you remember where the conversation took place that you have talked about – painting the floorboards and the deck boards and generally keeping up the boat?

A. I would imagine it was on the boat itself. I – you know, other than that, I couldn't really say for sure.

Q. Okay. Did you participate in putting the seventy-horse engine on the skiff?

* * *

(RT 357) Q. Was there any policy that you were aware of – again, this is before they left – with regard to your use of that skiff? Or for that matter, any crew members' use of the skiff?

A. I didn't quite catch that.

Q. Okay. Let me start over then. Before your father and the rest of the crew left Kodiak, was there any policy that you were aware of – were you aware of any policy with regard to the use of the skiff by anybody?

A. Yeah. I knew that, you know, I needed permission to use the skiff, yes.

Q. How did you know that?

A. Just because it – you know, it really wasn't my skiff just to jump in and take off with. And –

Q. All right. And did you have a practice, or a habit, or a custom of jumping in the skiff and just using it?

A. No, I never had that habit. Never.

Q. Did you – what did you do when you used the skiff? How did you come to use it then? Before – again, this is before they left to go to Seward.

A. If I indeed used it.

Q. Yeah. If you used it, what did you do?

A. I may have gone and filled up kicker cans, like I mentioned, or gone to the beach and got the lead. There's a number of things I may have done.

Q. All right. Before the rest of the crew left to go to (RT 358) Seward did you ever use it to go to any beach parties?

A. Before the crew left to Seward?

Q. Yes.

A. Uh – no, I don't believe so. No.

Q. Okay. Do you know who – I don't know her last name now, but her last name then was Lori Chichenoff. Do you know what she was?

A. Yes, I know her. I know who she is.

Q. And you knew her at the time?

A. Yes.

Q. Did you ever take her out riding in the skiff?

A. I don't recall. No. I don't recall taking her –

Q. You may have, or you may not have?

A. Yeah. Yeah, I may have. I don't think I did.

Q. Did you have any understanding about whether or not you had to ask permission to use the skiff? Again, this is before they left.

A. Yeah, I knew I had to have permission. It was – you know, it was like, whoever was the skiffman had responsibilities of that skiff. And you know, to my knowledge, he didn't want anybody jumping in it. He may not have been the owner of the skiff, but, you know, he's supposed to keep it up, and that's his job. He might not want anybody else in the skiff. And I'm sure that the skipper, you know, laid drills down, was, nobody was to jump in the skiff and whatnot.

(RT 359) Q. The skipper was your father.

A. Yes.

Q. Did he treat you any differently than he treated Joe Borg or any other non-family member?

A. Not – not fishing on the boat, no. I mean, I'd – you know, I'd do my job, and they had to do theirs, and if you didn't you heard about it.

Q. Now after – at the time that your father left, and the rest of the crew left – you heard Joe Borg testify a moment ago, did you not? About what was said then?

A. Yes.

Q. You heard Joe Borg testify a little while ago in this courtroom about what he recalls being said when the rest of the crew left, and left you?

A. Yes, I do.

Q. You don't recall that conversation?

A. No, I do not.

Q. When they left, did you have any understanding about what – about what permission you had to use the skiff, if any?

A. Could you say that again, please?

Q. It wasn't a very good question, was it?

A. I'm having a hard time –

Q. What knowledge or understanding did you have about whether you could use the skiff, when they left? What did you believe your authority was, to use the skiff when they left Kodiak to (RT 360) go to Seward?

A. I – I can't – I'm having a hard time understanding the question.

Q. Okay. Did you think you could use the skiff, when they left you with the FJORD?

A. Well, I knew I needed permission. There was nobody to ask, you know. And it was 4th of July weekend, so –

Q. Well, did you think you could use it, or think that you couldn't use it?

A. I knew I needed permission, so, I didn't – you know, I just used it.

Q. You did use it, in fact.

A. I did use it.

Q. All right. And you didn't have permission from your father?

A. That's true.

Q. Were - when you used the skiff, after your father left that weekend, what did you use it for?

A. A couple of buddies came down to the boat and wanted to go to a party, over to a beach. And they bugged me and bugged me and bugged me, and I kept telling them no, no, no. And finally, being buddies and all, I finally got talked into it, and I said okay, I'll go.

Q. Who were they?

A. I don't really recall exactly. I do believe two people

* * *

(RT 383) A. That was my assumption.

Q. And who all got in the boat with you?

A. As far as I know, Dale, Pat, I know there was two fellows from the TIGER CAPE, which I know - Kevin Boggs said he was off the TIGER CAPE, so he must have been in my skiff. And there was Scott McCain, myself - let's see - Pat, Dale, myself, Scott McCain, and two guys from the TIGER CAPE, and that was it.

Q. So that makes how many people?

A. Six.

Q. Including you?

A. Including me.

Q. Now, when you got in the boat, where did everybody arrange themselves?

A. I do believe Scott McCain and one of the fellows from the TIGER CAPE was in the bow. Next back on the left-hand side was Dale Carlough. Next back was Pat Churchill. And then Kevin Boggs must have been on the other side somewhere, or in the front. I'm not sure which of those two was which. And then I was in the very back.

Q. All right. Now, were there any seats in the boat?

A. Yes. There was two bench type seats, one on each side of me. And then -

Q. One on each side of the kicker?

A. - there was like a flotation tank type seat in the front.

* * *

(RT 476) MR. W. H. McLINN: It's gone.

THE COURT: All right, thank you.

You may step down.

MR. YOUNG: Based on Your Honor's rulings I guess I won't be recalling Officer Riffe.

THE COURT: All right. Fine.

Your next witness, then.

MR. YOUNG: Call William McLinn.

THE COURT: You've already been sworn, too, so just be seated. You're still under oath.

WILLIAM H. McLINN RECALLED
AS DEFENDANTS' WITNESS

DIRECT EXAMINATION

BY MR. YOUNG:

Q. Bill, how old are -

THE COURT: Are those exhibits still there?

THE WITNESS: Pardon?

THE COURT: Are those exhibits still there?

THE WITNESS: Yes.

THE COURT: Would you hand them to -

MR. YOUNG: Go ahead and give them to the Court. I won't be asking you about them for a little while, maybe not even today.

We'll be breaking about ten minutes to four, Your Honor?

THE COURT: About ten or five to.

* * *

(RT 496) done.

Q. Had to be painted?

A. To be painted.

Q. Anything else he was supposed to do?

A. Purchase the paint for 'em. The boat leaked. It needed to - make sure the pumps work. Have Rulemaster [phonetic] pump. The switches don't always activate themselves. It needed the up - it needed the overlook taken care of.

Q. Be a watchman, as it were.

A. Right.

Q. And plus the painting.

A. And I didn't know the boat, I just had it. And I hadn't had much experience with it.

Q. Did you trust him to do that?

A. Yes.

Q. Why did you trust him to do that?

A. I had no reason not to.

Q. Did you have any doubt about his ability to do that?

A. No, I didn't.

Q. What did you tell him, if anything, about use of the skiff?

A. I specifically remember the day I left, moments before I walked down the float to leave, I said I saw no reason for him to use the skiff while I was gone.

Q. Okay. And was anybody around when you said that?

* * *

(RT 557) and 1978 it was in the name of James Bays.

Q. So you transferred it to him.

A. And that was part of the condition that went with him purchasing the vessel ROVER.

Q. Okay. As far as '78 and '79 too, fishing was pretty poor in Kodiak, wasn't it?

A. 1978 I did a \$49,000 gross.

Q. '79?

A. I'm not right sure. I fished quite a bit of fish in that year.

Q. This whole operation that you had was kind of a family operation, was it not? Fair to say?

A. I generally had the responsibility of my sons, yeah.

Q. This was something you did to keep your sons kind of close to you in the summer time.

A. You might say that.

Q. Okay. And you hadn't seen Russel all that much before this particular summer. Isn't that true?

A. That's probably true.

Q. And when it came time to go wherever you went, before the 4th of July weekend, you left Russel there in charge of the boat.

A. I did.

Q. And he had the duties of a crewman. He some painting to do.

(RT 558) A. I would assume so, yes.

Q. Okay. And the reason why you left Russel there as opposed to one of your other sons was because, as you testified a moment ago, his friends were there. He didn't want to go to Seward.

A. It was his choice to stay there, for his reasons.

Q. Okay. Your testimony on direct examination was, it was because his friends were there.

A. That's what he told me. He says, "I don't want to go. My friends are here."

Q. And when you left, you left the keys in the skiff, and a key in the seine boat.

A. I did.

Q. A key to the skiff in the skiff, and a key to the skiff in the seine boat.

A. I did.

Q. And it's your testimony that just as you were leaving, you told Russel, "I see no reason for you to use the skiff."

A. I told him that.

Q. Why did you leave the keys?

A. Why did I leave the keys in it? Why should I take the keys out?

Q. Well, aren't you worried of theft, or something like that at least?

A. You don't need a key to steal a boat.

(RT 559) Q. Well, it helps, doesn't it?

A. Not if a person wants to steal it.

Q. Okay. Would you concede that there might be reason that Russel might need to use the skiff?

A. If there was fire he might want to tow something away, you know. Who knows?

Q. So it was really up to him, whether he needed to use the skiff or not.

A. Probably not.

Q. He was in charge of it, wasn't he?

A. He was in charge of taking care of the boat.

(Pause.)

Q. Do you have any other plane ticket indicating, sir, that you went to Anchorage during any other time during that summer?

A. I'd have to look at these records.

Q. Well, they're here, aren't they?

A. These records you've looked at.

Q. Well, you - they're your records.

A. You're asking me how many times I flew to Anchorage?

Q. I'm asking if you've got any record that shows that you ever went back to Anchorage, so that you can somehow get to use the rest of that portion of the ticket, on a different date.

A. I don't know.

Q. Well, could you look at it?

A. Do you want me to look to see if there's more than one

* * *

APPENDIX D

ALASKA STATUTE:

Sec. 05.25.040. OWNER'S CIVIL LIABILITY. The owner of a watercraft is liable for injury or damage caused by the negligent operation of the owner's watercraft whether the negligence consists of a violation of a state statute, or neglecting to observe ordinary care in the operation of the watercraft as the rules of the common law require. The owner is not liable, however, unless the watercraft is used with the owner's express or implied consent. It is presumed that the watercraft is being operated with the knowledge and consent of the owner, if at the time of the injury or damage, it is under the control of the owner's spouse, father, mother, brother, sister, son, daughter, or other member of the owner's immediate family. This chapter does not relieve any other person from a liability which the person would otherwise incur, and does not authorize or permit recovery in excess of injury or damage actually incurred. (§ 8 ch 63 SLA 1961)

ALASKA STATUTE:

SEC. 05.25.100. DEFINITIONS. As used in this chapter, unless the content otherwise requires,

(1) "department" means the Department of Public Safety;

(2) [Repealed, 5 3 ch 60 SLA 1976.]

(3) "operate" means to navigate or otherwise use a watercraft for recreational purposes as opposed to business, subsistence or commercial purposes;

(4) "watercraft" means every description of vessel, other than a seaplane on the water, used or capable of being used as a means of transportation on water and devoted to recreational pursuits unless otherwise expressly provided in this chapter; and excepting vessels having a valid marine document issued by the United States or foreign governments;

(5) "waters of the state" means all waters, fresh or salt, inland or coastal, within the territorial limits or under the jurisdiction of the state. (§ 2 ch 63 SLA 1961; am §§ 2, 3 ch 60 SLA 1976)
